THE LIABILITY OF THE UNDISCLOSED PRINCIPAL IN CONTRACT.

The right, under the decisions of the courts, of the person who has contracted with the agent of the undisclosed principal to recover on the contract in a suit against the undisclosed principal, is settled. A may contract with B as principal, but if, as a matter of fact, B has made the contract as the agent of C, A, on discovering this fact, may elect to hold either B or C on the contract. The law, however, does not permit him to regard B and C as jointly liable, or to regard C, the undisclosed principal, as surety for the agent, B, or B as surety for C. The law merely gives to A a choice between two alternatives. He may adopt the view of the transaction which he had when the agent negotiated the contract with him, and sue the agent as principal. On the other hand, A may treat the transaction as it really is, a transaction with an agent, and proceed directly against the principal. Once, however, his election is made, he cannot draw back. Having sued the undisclosed principal as principal, failing to collect his judgment, he cannot afterwards adopt his original view of the transaction and sue the agent on the contract. Or, if he still pursues the agent on the contract after learning of the existence and identity of the undisclosed principal, he cannot, on failure to obtain satisfaction of his judgment, proceed against the principal.

To the liability of the undisclosed principal in contract there is one universal apparent exception. An undisclosed principal is not liable on the formal contracts negotiated by his agent. He is only liable on simple contracts. If B, the agent of C, acting for C, but in his own name, enters into a covenant with A, A cannot, on discovering the existence and identity of C, sue C on the covenant.

Our law, having adopted the theory that the undisclosed principal is liable on the simple contracts made by his agent, has applied the theory in all but one case with logical consistency. Thus, suppose an agent deals for a disclosed principal, correctly stating the general scope of his, the agent's, authority. The principal is liable if the contract made in his name by his agent is within the general scope of the agent's authority, even though the principal may have expressly prohibited his agent from making that particular contract; provided, of course, the person dealing with the agent

did not know of this prohibition at the time the contract was negotiated. In the same way, an undisclosed principal is held liable on a contract which is against his special instructions to his agent, but within the general powers which he has conferred upon his agent.[1]

In one case, however, there has been some hestitation in applying the ordinary rules applicable to the liability of the principal for the acts of his agent to the undisclosed principal. Suppose that prior to the discovery of the agency by the person who has contracted with the agent, the principal has settled with his agent on account of the contract. Where the principal is disclosed prior to making the contract, the fact that he may have settled with his agent, either before or after the contract was negotiated, does not affect the right of the person who has contracted with him through his agent to recover from him; unless by his conduct such person has led the principal to suppose that the agent has settled with him and thus induced the principal to settle with the agent. In the case where the principal is not disclosed, the person who has contracted with the agent cannot be charged with negligence if he so acts as to lead the principal to suppose that the agent has settled with him. It would, therefore, logically follow that he could always recover against the undisclosed principal irrespective of the state of the accounts between the principal and the agent. Yet several courts have decided that if the principal has settled with his agent, prior to the discovery of the agency, the person who has contracted with the agent cannot recover against the principal. The origin of this exception is a dictum of Lord Mansfield in the case of *Railton* v. *Hodgson*,[2] and of other judges in *Thomson* v. *Davenport*.[3] In the former case Lord Mansfield said that if the undisclosed principal had, in the case before him, really paid the agent "it would have depended upon circumstances whether he would be liable to pay for the goods over again;" adding, "that if it would have been unfair to have made him liable, he would not have been so." It may be that all Lord Mansfield meant was that had the undisclosed principal become known to the plaintiff, and had the plaintiff then so acted as to have caused the principal to pay the agent, the plaintiff could not have required the defendant to pay a second time. Lord Tenterden, however, in *Thomson* v. *Davenport*,[3] in stating the liability of the undisclosed principal,

[1] Watteau *v.* Fenwick, L. R. [1893] 1 Q. B. Div. 346.
[2] (1804) 4 Taunt. 576, note A.
[3] (1829) 9 B. & C. 78.

said that it was subject to the qualification "that the state of the account between the principal and the agent is not altered to the prejudice of the principal." [4] And in the same case Mr. Justice Bayley said:

"If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." [5]

While these dicta are the ostensible foundation of those decisions that have exempted the undisclosed principal from liability where he has settled with his agent, the real reason for the maintenance by respectable courts of so anomalous an exception, is the widespread feeling that the rule which makes the undisclosed principal liable on the simple contracts of his agent is itself an anomaly.[6]

The most extended discussion, known to the writer, of the question of the liability of the undisclosed principal in contract is that of the late Mr. Ernest W. Huffcut in his thoughtful work on Agency.[7] He began the discussion by the statement that "a fundamental notion of the common law is that a contract creates strictly personal obligations between the contracting parties.[8]

It follows from this, as Mr. Huffcut pointed out, that the rule in the United States allowing the beneficiary to sue on a contract made for his benefit, and the rule allowing the undisclosed principal to be sued and to sue on a contract made with his agent as principal, are both anomalous, in the sense that they are contrary to the fundamental common law conception of contracts. He

[4] At page 86.

[5] At page 88.

[6] The undisclosed principal is now probably liable in England, although he has settled with his agent prior to the discovery of his existence and identity by the person who has dealt with his agent. See Armstrong *v.* Stokes (1872) L. R. 7 Q. B. 598; also, cases discussed in notes to the Eleventh Edition of Smith's Leading Cases, 2nd Volume, page 401, *et seq.* In the United States, however, the dicta of Lord Tenterden and Mr. Justice Bayley seems to have been followed in the few reported cases which have arisen. See the cases collected by Mr. Mechem in his work on Agency, § 667, page 526, note 3. The leading American case is Fradley *v.* Hyland (1888) 37 Fed. 49. The opinion of Judge Wallace in this case is an excellent illustration of the assertion in the text to the effect that the real foundation of the exception is the belief that the rule which makes the undisclosed principal liable in contract is itself an anomaly.

[7] Huffcut on Agency (2nd Ed.); Chapter X, page 158, *et seq.*

[8] *Ibid.*, page 158.

ascribed the rule which allows the undisclosed principal to be sued on the contract as "probably the outcome of a kind of common law equity, powerfully aided and extended by the fiction of the identity of the principal and agent."[9]

Though Mr. Huffcut regarded the rule permitting the undisclosed principal to sue on the contract as anomalous and the outcome of ill-defined notions of equity assisted by fiction, he nevertheless admitted that some liability should rest on the undisclosed principal, for he said: "The action against an undisclosed principal rests logically upon the ground that the principal's estate has had the benefit of the contract and ought to bear the burden," adding, "This doctrine is as old as the Year Books."

If, then, the theory adopted by the courts, that the person who has dealt with the agent of the undisclosed principal may regard his contract as with the principal, is anomalous, and, nevertheless, it is just that there should be some liability arising out of the transaction fastened on the principal, what are the possible theories of liability on which the courts could have proceeded had they refused to allow a recovery against the principal on the contract? Mr. Huffcut suggested one theory: the theory that the undisclosed principal should be liable on the ground of the benefit conferred on his estate by the person who has contracted with his agent. On the other hand, the writer has found that when the basis of the liability of the undisclosed principal is under discussion in the class room, the idea that the undisclosed principal, if not held in contract, should be held in tort, is very prevalent. Before examining what we may call the "benefit" theory of the undisclosed principal's liability, let us examine this "tort" theory.

The thought lying back of the suggestion that the undisclosed principal may be held in tort is usually that the principal, in concealing his activity by holding out his agent as principal, has wrongfully deceived the person who has contracted with his agent, and that, for this deceit, he should be held liable. Assuming for a moment that the wilful concealment by the undisclosed principal of his interest in the transaction is a wrong to all those who deal with the agent, the extent of the right of the third person against the undisclosed principal would be radically different from what it is under the present theory that the contract is really with the undisclosed principal. In the first place, the measure of dam-

[9] *Ibid.*, page 161.
[10] *Ibid.*, page 162.

ages would be different. At present the third person may recover against the undisclosed principal a sum measured by the benefit which he would have received had there been no breach of the contract. But the supposed tort of the undisclosed principal which we are now discussing, is not the tort of causing the agent with whom the contract is made to break that contract, but the concealment by the undisclosed principal, at the time the contract was consummated, of his interest in the transaction. The measure of damages, therefore, recoverable by the person who has contracted with the agent would not be the damages resulting from the breach of the contract but the trouble and expense such person had been under in the negotiation, and the expense to him, if any, involved in the execution of the stipulated consideration. Where he had not paid any money under the contract or done any other act detrimental to him, stipulated for in the contract, the damages which he could recover from the undisclosed principal,—if indeed he could under these circumstances recover at all,—would be merely nominal, however valuable the contract. Again, if the undisclosed principal is sued in tort and not in contract, he cannot be made to specifically perform the contract, even though he has, and his agent has not, the means of performing it. Of course, if the undisclosed principal did more than merely withhold from his agent the means necessary to enable his agent to fulfil the contract—if, for instance, he especially forbid the agent to perform—then he might be regarded as having caused a breach of the contract, and under the principle first enunciated in the case of *Lumley* v. *Guy*,[11] the person with whom the agent had contracted might recover from him a sum measured by the value of the contract the breach of which he had caused. The usual expression, however, of the "tort" theory of the undisclosed principal's liability, is that he has been guilty of deceit in concealing his identity, not of a tortious interference with a contract.

Again, under the theory that the undisclosed principal should not be liable on the contract, but in tort on his deceit, there might be at least two cases in which he would not be liable to the person who had contracted with his agent, where, under the present theory, recovery may be had against him on the contract. The liability of the undisclosed principal, where he had not directed his agent to conceal his identity, would be doubtful, as would his liability in those cases where the contract made by his agent,

[11] (1853) 2 E. & B. 216.

though within the general scope of the agent's authority, had been expressly forbidden by him. In both of these cases the deceit would not be the deceit of the undisclosed principal, and the only reason for permitting the person who contracted with the agent to sue him in tort would be the analogy between the case made by the plaintiff, and the cases which have held a principal liable for the deceit of his agent, where the deceit was practised by the agent in the course of the prosecution of his principal's business, even though the principal has in no way authorized the deceit.[12]

The difficulty, however, which arises in connection with holding the undisclosed principal in deceit is not that the nature and extent of the liability of the undisclosed principal would be different from what it is when the undisclosed principal is held on the contract. If, as a matter of fact, the undisclosed principal has not broken a contract with the plaintiff, but has tortiously acted to the plaintiff's detriment, the changes in the substantive law resulting from holding the defendant in tort and not in contract would be just, because, by the supposition, the changes would make the law correspond to the real nature of the acts of the undisclosed principal. The difficulty, in connection with holding the undisclosed principal in deceit, is to show that he has so acted as to deceive the plaintiff. What has the principal who has concealed the fact that he is principal actually done? In every case, where the concealment is his act and not solely the act of his agent, he has made a contract with his agent that the agent shall make a contract in his, the agent's, own name, and that he, the principal, shall have the benefit of this contract. The agent has carried out this arrangement. He has not actively represented to the person with whom he deals any material thing which is not so. In making the contract the agent has said: 'I am responsible." This is not a misrepresentation; he *is* responsible. The thought might be harbored that in certain cases, as in contracts of purchase, the agent has represented that he would own the goods on their delivery to him by the seller. But a moment's reflection shows us that a purchaser never makes by implication such a representation. The man who buys goods on credit intending to give them away has not committed a tort. The donee, who knew the purchaser bought the goods on credit with the intention of giving them to him, does not do any wrong to the seller in accepting the gift.

[12]See Hern *v.* Nichols (1708) 1 Salk. 289; Barwick *v.* English Joint Stock Bank (1867) L. R. 2 Exch. 259; also, cases collected by Mr. Huffcut in his Agency (2nd Ed.) page 200, note 4.

But it may be contended that in many cases the person who has dealt with the agent has been deceived into trusting the agent by the fact that the undisclosed principal has clothed the agent with the appearance of wealth. The case of the man who is the ostensible owner of a prosperous business, when he is in fact nothing more than its manager, may be given as an illustration. But there is no difference between the supposed deceit of the undisclosed principal in putting his agent in charge of his business to manage it in his, the agent's, own name, and the act of the man who lends another sufficient to purchase a stock of goods and enter into business, under an agreement that the lender will own all the goods and all the proceeds until his loan is returned. Neither is there any essential difference between the undisclosed principal who clothes his agent with the appearance of wealth, and the man who gives another money, knowing that he will use the money to buy many clothes and live in good style in order that he may obtain credit.

Of course if the principal instructs his agent to actively represent to any possible inquirers that the business and its property are the agent's, and the agent carries out these instructions, the undisclosed principal is a partner in the deceit. The ordinary case, however, is the case of the undisclosed principal who has done nothing more than put his agent in charge of a business, telling him to conduct it in his, the agent's, own name. That many men do trust to appearances of wealth without even asking those they trust whether the appearance is justified by the fact, is undeniable. Whether it is wise to encourage this kind of negligence, by permitting the persons who deal with others on the basis of their appearance of wealth to recover against those who knowingly gave them the means to deceive, is, to say the least, doubtful. However, for our present purpose we may admit that much can be said in favor of the proposition that every man should be liable in deceit, where he has so acted that a reasonable man in his place should have known that his act would cause others to enter into contracts with one unable to fulfil those contracts. But in applying the principle just stated to the case of the undisclosed principal who has clothed his agent with the appearance of wealth, two things would have had to have been recognized by the courts. First, that the principle was distinctly new. Our law has not yet held a man liable to those with whom another has contracted because he gave that other the means of appearing rich and by this appearance enabled the other

to obtain credit. Second, that once the principle was recognized, then the liability of the undisclosed principal would be only one of its many possible applications. True, our law is progressive. At least our law of torts is still capable of development by judicial decisions. The fact that a principle of far-reaching importance was new would not have condemned it; but it would have necessitated a most careful consideration of the proposed principle in all its possible ramifications, before the courts would have applied it to a particular class of cases. It should also be pointed out that even if our courts had adopted or would now adopt the principle, there could be no recovery in tort against the undisclosed principal in cases where the agent had not been given a false appearance of wealth. If, at the time of making the contract, the agent was really wealthy, so as to be amply financially responsible for the contract, the mere fact that the person who contracted with him gained the idea that he was wealthy because he was the apparent proprietor of a flourishing business, would not enable such person to recover against the undisclosed principal if an unexpected catastrophe overwhelmed the personal fortune of the agent; for, in the case put, the undisclosed principal has done nothing to cause the person contracting with his agent to misjudge the fact of the agent's wealth at the time the contract was entered into. Again, the plaintiff would have to prove affirmatively that he was deceived, not merely that he might have been deceived by the apparent wealth of the agent. He would have to show that the apparent wealth was a determining factor in the causes which led to his making the contract.

The conclusions reached from an examination of the question whether, had the courts refused to hold the undisclosed principal in contract, they could have allowed the person who had contracted with his agent to proceed against him in tort on the ground of deceit, may be expressed as follows:

As the law now stands, only under exceptional circumstances could the undisclosed principal be held in any case on the theory that he had so acted as to deceive the person who dealt with his agent. The necessary elements of deceit are practically never present. It would have been possible, however, by an extension of the principles pertaining to deceit in a way which may have some justification, to have held the undisclosed principal—not in every case where his agent had failed to perform the contract—but in certain cases. Even in these cases. however, the measure of the

amount which the plaintiff could recover would not have been, as at present, the loss of the benefit of the contract, but the positive harm, if any, suffered by the plaintiff as a result of executing the consideration stipulated for in the contract. In short, the conclusion is, that had the courts attempted to hold the undisclosed principal in deceit, the result would have been to free him from any liability in the great majority of cases, and perhaps practically in every case.

Let us now turn to the suggestion that, while the undisclosed principal should not be held liable on the contract, the person who has contracted with his agent may fasten a liability upon him on the theory that, as his estate has received the benefit, so it should bear the burden of the contract. The effect of this "benefit theory" of the undisclosed principal's liability on the extent of that liability is largely a matter of speculation. Had the courts adopted it, instead of allowing the undisclosed principal to be sued on the contract, it is conceivable that they might have gone so far as to say that, when the person who contracted with the agent had fulfilled his part of the contract, the undisclosed principal's estate had always received the benefit, and, therefore, that it should bear the burden, irrespective of the state of the accounts between the principal and his agent. This interpretation of the "benefit theory" would not alter the extent of the undisclosed principal's liability as that liability is worked out by our courts under the theory that the contract is, as a matter of fact, with the undisclosed principal, in those cases where the person who has contracted with the agent has performed his part of the contract. It would, of course, have prevented any recovery where the contract was entirely executory. It is, however, probable that had the courts attempted to work out the undisclosed principal's liability for the contracts of his agent on the theory of a benefit received, his liability would have been confined to cases in which the state of accounts between him and his agent showed that he had, as a matter of fact, received the benefit of the contract.

To the writer, the fundamental objection to placing a personal liability on the undisclosed principal because he has received the "benefit of the contract" is the same as that which is urged against the theory actually adopted by the courts; namely, it is an anomaly. As has been pointed out, the donee or the purchaser does not have to bear the burden of the contract to purchase merely because he receives the goods purchased; that is, the benefit of the contract.

In the case of the donee it is manifestly just that he should not be liable. To attempt to place a liability on the undisclosed principal solely because he has received the benefit of the contract is, therefore, to attempt to introduce a novel principle into our law, and one which will not bear examination.

This criticism may not, however, be entirely fair to those, who like the late Mr. Huffcut, have suggested that the "benefit to the undisclosed principal's estate is the true basis of his liability." There are two prominent differences between the position of the undisclosed principal and the position of the donee of the benefit of a contract. In the first place, when the contract is within the general scope of the agent's authority and not specially prohibited, the undisclosed principal has caused the contract to be made. In the second place, where the undisclosed principal has not settled with his agent before receiving or using the benefit of the contract, he has benefited by the contract at a time when he was under another contract with his agent to bear the burdens of the contract the benefit of which he was enjoying. It may be that those who advocate the "benefit" theory of the undisclosed principal's liability do so because they combine the benefit with one or the other of these facts which distinguish, in the great majority of cases, the position of the undisclosed principal from the position of the person who is merely the donee of the benefit of a contract. In other words, that the thought underlying the "benefit" theory is, either that one should bear the burdens of all contracts which he has caused to be negotiated and from which his estate has received the benefit; or, the thought is that the person who has contracted with the agent of the undisclosed principal should be subrogated to the rights of the agent against the principal.

To hold the undisclosed principal for the burdens of the contract, where he has both caused the contract and received the benefit, would appear to be just. Though it would be an anomaly to hold the undisclosed principal for the burdens of the contract merely because he has received its benefit, it does not follow that he may not be held if he has not only received the benefit, but has been a moving cause in the creation of the contract. If, therefore, the courts had regarded it as improper to hold the undisclosed principal liable on the contract, it would have been entirely proper to have made him liable in certain cases, on the ground that he had benefited by an act which he had caused his agent to perform.

Neither can the writer see any fundamental objection to the proposition that the person who has contracted with the agent of the undisclosed principal should be subrogated to the right of the agent, as agent, against the principal. Our law has already adopted this idea in dealing with the contracts of a trustee. The right of the person who has contracted with a trustee, though the contract is a proper one and for the benefit of the trust, is primarily against the trustee. But, if the trustee fails to discharge the judgment, or is bankrupt, or out of the jurisdiction, the person with whom he has contracted may bring a bill in equity against the *cestui que trust* to subject the trust *res* to the payment of the debt. The success of the plaintiff depends on what would have been the rights of the trustee to recoup himself from the trust *res* had the trustee fulfilled his contract with the plaintiff. It is true that it is doubtful whether in any case the law would fasten a personal obligation to pay the debt on the *cestui que trust.* It is generally assumed that the right of the plaintiff is confined to the trust *res.* But this is because of the inability of the trustee to fasten a personal obligation on the ordinary *cestui que trust* to repay him for the legitimate expenses of the management of the trust when the trust *res* is insufficient to discharge the obligation which he has discharged for the trust *res.* In the case of the undisclosed principal there is no such difficulty. The agent can always fasten on his prinicpal the obligation to reimburse him for legitimate expenses incurred in carrying out the duties of the agency; and, therefore, on the theory we are now discussing, the person who has contracted with the agent of the undisclosed principal, being subrogated to the rights of the agent against the principal, could always fasten a personal obligation on the principal to bear the burdens of the contract, where he could show that the undisclosed principal had received the benefit of the contract, and that, had the agent discharged the burden, he could now recover from the principal.[13]

[13]There is an interesting article on "Liability of Trust-Estates on Contracts Made for Their Benefit," in the *American Law Review,* Volume 15, page 449, in which the writer, Mr. Louis D. Brandeis, has collected all the cases reported at the time he wrote (1881). He takes the position that the person who deals with the trustee should be allowed to recoup himself out of the *res* in all cases where the contract "was necessary and proper for the administration of the trust." He points out that it is improper to speak of the trustee as having a right to a lien on the trust *res* until he has discharged the contract. The leading cases, however, have proceeded on the theory of subrogation stated in the text. See especially opinion of Sir George Jessel, *In re* Johnson (1880) L. R. 15 Ch. D. 548.

As far as can be seen, the adoption of this "subrogation theory" would have resulted in the same liability being fastened on the principal as if the courts had proceeded on the theory that the principal should be liable for the burdens of the contract where he had caused it to be negotiated and received the benefit. On neither theory would the undisclosed principal be liable where he had expressly forbidden the contract, though it was within the general scope of his agent's authority, and on neither theory would he be liable when he had settled with his agent or where the contract was executory. On the other hand, the theory that the contract is, as a mater of fact, with the undisclosed principal, makes him, as a logical necessity, liable in all of these cases.

Let us now examine more carefully the actual theory on which the courts have proceeded: the theory which regards the contract as with the undisclosed principal, and makes him liable in every case where he would be liable if he had been named as principal in the contract. One of two things must be true. Either the extent of the liability of the undisclosed principal on the contract should be, or it should not be, exactly the same as the liability of the disclosed principal on the contract negotiated in his name by his agent. If the fact of the principal's being undisclosed should make a difference in the extent of his liability, then the present law, which makes the undisclosed principal directly liable on the contract, and, therefore, logically puts him in the same position in every case as the disclosed principal, is more than a mere mistake in the reasons given for the undisclosed principal's liability, or in the tribunal in which the person who has contracted with his agent should proceed; it is a grave error in the substantive law, which throws a burden on the undisclosed principal which he should not bear, or which refuses to place a burden upon him which he should bear. On the other hand, if the fact that the principal is undisclosed should make no difference in the extent of his liability arising out of the contract of his agent, then the rule which permits the person with whom the agent has negotiated a contract to proceed against him directly on the contract, is, at most, an error in the machinery which the courts have selected to enforce a proper liability.

The best way of testing the question, whether the fact that the agent conceals the existence and identity of his principal should or should not affect that principal's liability, is to turn to the case of the disclosed principal, and ask ourselves, what is the fundamental

reason, or what are the fundamental reasons which make the principal liable to the person with whom his agent has in his name negotiated a contract.

Where the principal is disclosed by the agent, in ninety-nine cases out of a hundred, the disclosure is due to the fact that the principal has permitted his agent to hold him out as principal. A man may be liable in contract because he has directed or permitted another to hold him out as principal, though as a matter of fact he is not principal. But it by no means follows from this, that where one man makes another his agent, and holds him out to the world as his agent, he is liable on the contracts made for him by his agent, solely for the reason that he has held him out as agent. It may be that a man should be liable whenever he holds out another as his agent for contracts made in his name by the agent. But this rule is not the only rule of our law, and may not be the only one on which the liability of the disclosed principal rests. In many cases a man is liable to another, not merely on one, but on two or more distinct principles of law, all of which are applicable to the facts. Where A makes B his agent and holds him out as such he is liable to those with whom B contracts on the ground of the "holding out." But, even if the rule of liability on the ground of "holding out" never existed, there is another rule of law, also applicable to the case put, which would make the principal liable. This rule is the fundamental one which underlies all the liability which our common law imposes on one man for the acts of his business associate, whether that associate is his agent, his partner, or the director of the corporation in which he is a stockholder. The rule is this: One who has ownership in and control of a business is personally liable, unless that liability is limited by statute, for acts done in the course of and for the business.

A glance at the answers made by the recorded cases to the various questions arising out of the torts of agents in the pursuit of their principal's business, makes the application of this fundamental rule of the common law to the liability of the principal for the acts of his agent abundantly clear. The owner of the bakery is liable for the harm done to the man whom his delivery boy runs over in the course of his morning rounds. There is no need that the name of the principal should be emblazoned on the wagon. Indeed in such a case the difficulty is to hold the man who has no interest in the business, but who has permitted his name to be

placed on the store and wagons.[14] The corporation which assigns to its transfer agent the duty of making truthful answers to those who inquire about stock transfers is liable for the damage resulting from an untruthful answer made for the benefit of the corporation, though against the order of the directors; but, the English courts have held that the corporation is not liable where the answer made by the agent was for his own benefit; that is, in his own and not in his principal's business.[15] Again, in the domain of contracts, though the disclosed principal is liable for contracts made for his benefit within the apparent scope of the agent's authority, even though by secret instructions the principal has prohibited the particular contract, jurisdictions differ as to the liability of the principal on contracts made in his name within the apparent scope of the agent's authority, but not, as a matter of fact, for the principal's business.[16] In short, the principle that a man is liable for the acts of his agent if he holds him out as such has been doubtingly and haltingly applied, but the principle that the owner and controller of a business is liable for its contracts and its torts has been applied in every case in which the facts have permitted the application to be made. Indeed our law has visualized the business conducted by one man through agents as an entity apart from the creator, conductor and owner, as completely in agency, as in partnership or in corporations.

The rule that the owner and controller of a business is liable for acts done and contracts made in the course of the business is fundamental, in the sense that it has been applied, almost without exception, in every case in which the facts made its application possible. The rule itself rests on necessity. The business is one, though it has many manifestations of its activity. The abstraction, the juristic person, to use a Continental expression, cannot be made responsible; therefore, every system of law always has, and always must, turn to the owner and controller. On the other hand, the rule that a man is liable if he holds out another as his agent for the acts of his agent, is not so fundamental. It has not been applied in every case in which the facts made its application possible. Now it is evident that the rule which throws on the owner and controller of a business a personal liability for its activities, is as applicable

[14]Stables *v.* Ely (1825) 1 Car. & P. 614.
[15]Barwick *v.* English Joint Stock Bank (1867) L. R. 2 Exch. 250.
[16]Compare North River Bank *v.* Aymar (N. Y. 1842) 3 Hill 262, with Grant *v.* Norway (1851) 10 Com. B. 665; and Mussey *v.* Beecher (Mass. 1849) 3 Cush. 511.

to the undisclosed as to the disclosed principal. In both cases the rights and liabilities of the principal should be the same, where the contract was within the general scope of the agent's authority and is for the principal's business. It would be absurd to limit the principal's rights and liabilities by the fact that he has not held the agent out as his agent; for this would be to use a principle which the courts have recognized with many doubts and limitations, to effect a result reached by the application of a fundamental rule of law.

Mr. James Barr Ames in the notes to his Cases on Trusts has suggested that the real relation of the agent and the undisclosed principal is that of trustee and *cestui que trust,* and that to permit the undisclosed principal to sue on the contract is an "anomalous doctrine." [17] To treat the agent of the undisclosed principal as trustee requires the person who has contracted with the agent to work out his rights against the undisclosed principal in a court of equity. It results from the examination made of the proper extent of the liability of the undisclosed principal, that the necessity for resort to equity, and the theory that the best name to apply to the relation between undisclosed principal and agent is *cestui que trust* and trustee, should not result in any modification of the undisclosed principal's liability. Though not liable on the contract, he should be liable as if he had been the principal named in the contract. On the other hand, it is proper to admit, the objection to allowing the third person to proceed against the undisclosed principal on the contract, is, theoretically at least, more than procedural. Though justice may require the undisclosed principal to respond in the same damages as if he had been named as principal in the contract, and also may require the law to give him the right to obtain from the person who has dealt with his agent the same kind and quantum of satisfaction, the contention is that it is improper to say that he is liable or may recover *on the contract.*

The objection to allowing the third person to proceed against the undisclosed principal on the contract is based, as we have seen, on the conception so well stated by the late Mr. Huffcut:[8] "A contract creates strictly personal obligations between the contracting parties."

In short, permitting the undisclosed principal to sue or be sued on the contract may work out justice, but it is nevertheless an anomaly, and, like all anomalies, unfortunate. That an anomaly is

[17] Cases on Trusts (2nd Ed.) page 258, note 1.

unfortunate may be admitted. But since Mr. Huffcut wrote, a better understanding of the history of the actions of account and of debt has enabled us to prove that the assumption on which he based his conclusion is without foundation in fact, at least as far as one of our simple contracts is concerned; and the writer believes it can also be shown that the principle has no application to the simple contract of assumpsit.

The archaic contract of our law is the formal contract of which covenant is the principal survivor. In this contract the binding force of the obligation is the promise and the form in which the promise has been made. It expresses, though in a different way, almost the same truth, to say that in the formal contract a man is bound because he promised intending to be legally bound. It follows that in such a contract a man is only bound to what he has promised. If he has promised to pay B as principal, he cannot be made to pay C as principal. However lame some of the modern reasons advanced for refusing to hold the undisclosed principal on a sealed instrument executed by his agent as principal, it is clear that to so hold the undisclosed principal would be to disregard the fundamental nature of the formal contract. The covenantor is held to his promise because he promised under such a form as to show that he intended to be bound. But the undisclosed principal has made no promise. Furthermore he has never intended to be bound. How can he be held? The very lameness of some of the reasons given by modern courts for not holding the undisclosed principal on a sealed instrument shows how the ideas coming from the contract based on consideration,—by which we mean the contract developed in the action of assumpsit,—have served to hide the older and radically different contract which the action of covenant enforced.

Another ancient contract of our law is the contract arising from the completed sale enforced in the action of debt. Here the binding force of the obligation came primarily from the receipt of a *quid pro quo*. A promise to pay a definite sum of money on receipt of something of value, and on account of the receipt, was a binding promise, not because of the promise to plaintiff, but because the receipt of the *quid pro quo* raised a duty to pay the price. This duty could be enforced by any one beneficially interested. Thus, long before the contract developed in the action of assumpsit was ever heard of in the courts of common law, actions of

debt were being successfully brought by beneficiaries.[18] The subsequent action of the English courts, denying the right of the beneficiary to sue for a debt, but serves to show how far the ideas fundamental to the contract developed in the action of assumpsit,—in which the binding force comes from the consideration,—have tended to obliterate the fundamental conceptions lying at the foundation of the more ancient contractual liability expressed by the writs of account and debt. Nevertheless, the obligations enforced in the action of debt still survive; though in the great majority of jurisdictions the action of debt has been abolished. In theory, at least, the action of assumpsit, or other civil action for the breach of the obligations of a contract, can now be brought wherever in ancient times an action of debt for an obligation arising out of a commercial transaction could have been brought. If, therefore, there could have been no valid objection under the old English procedure to the recovery against an undisclosed principal on the debt incurred by his agent, there can to-day be no valid objection to a recovery on the contract against the undisclosed principal, where the contract is of such a nature that formerly the action of debt could have been brought for a breach of its obligations.

Where a debt had been created the action to enforce the obligation did not have to be between the parties to the transaction on which the obligation rested. This is shown by those cases in which the beneficiary was allowed to recover on the contract. If the undisclosed principal had been sued in the action of debt, the fact that he was not a party to the transaction from which the rights and obligation sprang would have been immaterial. Would the fact that the undisclosed principal had made no promise to any one have been also immaterial? The obligation enforced in the action of debt was the duty to pay. This duty did not always arise out of a promise. On the other hand, in those cases where the debt arose out of a sale to the defendant there always was a promise, either directly by the defendant or by the defendant's servant for the defendant, but whether the promise by the defend-

[18]The reader who wishes to examine the foundation of the assertions made in this paragraph in regard to the nature of the simple contract of debt, and the right of the beneficiary to proceed in the action of debt, is referred to the articles of the writer's associate in the Faculty of the Department of Law of the University of Pennsylvania, Mr. Crawford D. Hening, on "The Limitations of the Action of Assumpsit as Affecting the Right of the Beneficiary," published in the *American Law Register* (now the *University of Pennsylvania Law Review*), Volume 52, page 764; *Ibid.*, Volume 53, page 112.

ant, either directly or expressly for him by his servant, was regarded as an essential part of the plaintiff's right to recover, reported researches in the ancient books have not made clear. No case of the undisclosed principal being sued on a debt incurred by his agent for his benefit has yet been discovered.

However, it is not important for our present purpose to determine whether it is or is not consistent with the fundamental ideas of debt to allow a recovery against the undisclosed principal, because any combination of facts which brings into existence a simple contract on which an action of debt could have been brought, also brings into existence a contract based on consideration; and it is difficult to see the theoretic bases of the objection to a recovery against the undisclosed principal on the contract developed in the action of assumpsit, the most important of the contracts known to our law. The liability of the defendant in the suit on the formal contract comes from his intention to be bound; his liability in the action of debt lies in his receipt of the *quid pro quo;* but his liability in the suit on the contract worked out in the action of assumpsit lies in the fact that the plaintiff can show that he, the plaintiff, has done something which he would not otherwise have done, and which the defendant stipulated he should do. The element of deceit, on which the common law judges laid hold for procedural reasons, has in fact always been the fundamental element of the defendant's liability. Even in those cases where there is a mere promise for a promise, the basis of the plaintiff's recovery is that he would not have promised had the defendant not so acted as to have caused him to promise on the expectation of a benefit which the defendant has failed to give him. It is not the defendant's promise to the plaintiff on which the plaintiff recovers, but the fact that the defendant caused the plaintiff to do an act, though that act is merely a promise with he intent of being legally bound, which he would not have done had not the defendant acted. If, therefore, the true basis of liability on the contract developed in the action of assumpsit is that the defendant has so acted as to cause the plaintiff to act in a particular way for a promised reward which the defendant has not given, the liability of the disclosed or undisclosed principal depends on whether the principal has caused the contract to be made. Where the agent acts openly in his principal's name the usual explanation of the principal's liability on the contract is the fiction that the principal has made the promise. But if the thought just expressed is correct, the

fiction is an unnecessary invention,—the principal is liable on the contract because he has so acted as to induce the plaintiff to change his position for a stipulated reward.[19] His failure to give the reward is a deceit, and to hold a defendant liable in deceit it is not necessary that he should have come into direct contact with the plaintiff; it is merely necessary that the plaintiff show that the defendant is a moving cause of the harm for which the plaintiff seeks satisfaction. Where the principal is disclosed and the contract is made in his name, he has so acted as to induce the plaintiff to change his position. But the same is equally true in the case of the undisclosed principal; he has also moved his agent in the same way. To no greater and to no less extent than the disclosed principal has he caused the plaintiff to alter his position. To permit the person who has dealt with the undisclosed principal's agent in such a way as to raise a contract on which the action of assumpsit could be brought, on discovery of the principal, to elect whether he shall regard the contract as with the agent or with the principal, instead of being an anomaly and contrary to the fundamental common law idea of the reason for the obligation of the contract, would appear to fit in as perfectly with the fundamental idea lying at the foundation of the liability, as the denial of such a right to one who has made a formal contract under seal with the agent of the undisclosed principal, fits in with the fundamental idea lying at the foundation of liability on formal contracts. The rule denying the right to sue the undisclosed principal on formal contracts is not an exception to the rule permitting the undisclosed principal to be sued on simple contract. Both rules respond to the radically different ideas lying at the roots of liability in the two contracts. It might, of course, have been possible for our courts, when a formal contract was before them and the facts also showed a contract based on consideration, to disregard the formal contract and treat the rights of all parties from the standpoint of the contract based on consideration. But while possible, such a treatment would have been extraordinary. At the time of the development of the action of assumpsit the action of covenant existed as a separate action. It is natural,

[19]Where the principal had not specially authorized the contract, it could be shown to be his contract, by showing that the man who made it was his servant, and that he had received the benefit. The person who received the promise of the servant for the master recovered because it was made in the defendant's business. No fiction that the master and servant are one person was necessary to explain the result: Book of the Assizes, page 133, pl. 5; Seignior and Wolmer's Case, Godbolt, 360.

when facts show equally two forms of contract, to treat the rights and liabilities of the parties as being defined by that form of contract which is the more ancient of the two, provided that the older contract is still enforced in a distinct action from the action used to enforce the contract of more recent origin.

If the above conclusions are correct, the only anomaly in the branch of the law which we have been discussing is that to be found in the cases which hold, that if the undisclosed principal has settled with the agent before the third person discovers his existence and identity, the third person is deprived of his right to treat the contract as with the principal. It also follows that the reasons sometimes given for allowing the third person to proceed on the contract against the undisclosed principal, show an entire misconception of the true nature of the situation. It has been said that the law, by the fiction of identity of the agent and principal, holds the principal on the contract, though that principal be undisclosed at the time the contract is consummated. The explanation invents a falsehood to explain a result which needs no explanation. The basis of liability on the contract developed in the action of assumpsit is not the promise of the defendant, but the fact that one man has caused another to do or not to do an act for a stipulated benefit. Why should not our law regard the contract as with the person who is the prime cause of the plaintiff's changing his position? Where one contracts with the agent of the undisclosed principal, the contract is with the undisclosed principal, not with his agent. True, the agent who has made a contract in his own name is properly estopped from denying the truth of the fact which he has asserted to be true; namely, that he is a principal; but the law with equal consistency and propriety allows the person who has contracted, believing the contract to be with the agent, to proceed on the contract as it actually is,—a contract with the real, though undisclosed principal.

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